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Supreme Court, U.S.
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In the Supreme Court of the United States
October Term 1994

Gordon Finlay
Finlay Testing Laboratories, Inc.
Petitioners

v.

United States of America, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petition for Writ of Certiorari for the Petitioners

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QUESTIONS PRESENTED FOR REVIEW

1. Is a soon-to-be charged defendant entitled to conflict-free assistance of counsel during precharge negotiations with the prosecutor as to a disposition of this criminal case under the Sixth Amendment right to counsel or Rule 44(c)?

2. Was the first completely different conspiracy to transport nuclear material and falsify the records of transportation, a pre-Guidelines charge, properly determined to be Relevant Conduct (§ 1B1.3) for the distinct second conspiracy regarding the employment status of Carroll, a Guidelines charge, because the prosecution incorporated by reference the language of the first conspiracy?

3. Was it proper to impose separate sentences for seven false statements under 18 U.S.C. 1001 (Counts 15-21) arising out of the sending of a single document to the NRC on 5 October 1987 when the charge was making and using "a false writing or document" containing a false statement?

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OPINION BELOW

The opinion of the court of appeals is reported at 55 F.3d 1410 (9th Cir. 1995), and a copy is attached as Appendix A.

JURISDICTION

The judgment of the court of appeals was entered on 25 May 1995. The petition for rehearing (Appendix B) was denied on 19 July 1995. The jurisdiction of this court is based upon 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULE

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."

Rule 44(c) of the Federal Rules of Criminal Procedure provides: "Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation."

SUPPLEMENTAL STATEMENT OF FACTS

In December 1991 Dale Finlay, wife of Gordon, became the controlling 51% shareholder of Finlay Testing

Laboratories, Inc. (FTL). (PSR-FTL 14-15). In March 1992 Attorney Edmunds was retained to represent Gordon Finlay (Finlay) and FTL and shortly thereafter commenced plea negotiations with the U. S. Attorney, who demanded a waiver of the statute of limitations to continue plea negotiations. (3 Jun 93 RT 2-10). The first waiver (April) of the statute of limitations was solely by the corporation. From the outset, Finlay instructed Edmunds that he did not want to be held personally liable and wanted the charges placed against the corporation, FTL. (Def Ex 2; 3 Jun 93 RT 32, 141; 4 Jun 93 RT 150, 152).

On 16 September 1992 the indictment was filed. On 1 October 1992 Edmunds entered an appearance on behalf of Finlay and FTL and their not guilty pleas before the district court. (1 Oct 92 RT 1-10). Neither the magistrate nor the district court at any time made the required inquiry for multiple representation under Rule 44(c). No waiver of conflict of interest was filed by Edmunds or successor counsel Horie. The latter represented Finlay and FTL at trial and sentencing.

Count One charged a January-August 1987 conspiracy involving Finlay and many other persons in the transportation of radioactive materials in violation of the law and in the falsification of several records involving multiple air shipments. (CR 48:1-13, ER 1-13). Count Two, the only Guideline count,[1] charged a second conspiracy involving Finlay and Carroll which was limited solely to the

[1] The trial judge found that the acts of transportation and falsification of Count One were relevant conduct for Count Two. (Sent RT 47, 86). After imposition of the Guidelines on Count Two, the judge then ran all other counts concurrent with it. (Sent RT 92-93).

misrepresentation of Carroll's employment status to the U.S. Nuclear Regulatory Commission (NRC):

> In or about August, 1987, the NRC received information regarding possible violations by FINLAY TESTING LABORATORIES, INC. ("FTL") of FTL's license and the applicable regulations. As a result, the NRC commenced an investigation. That investigation uncovered violations including a February 9, 1987 shipment by Timothy Carroll of a radioactive source on board a passenger carrying aircraft from Honolulu to the Island of Hawaii for a FTL job at the Big Island Meat Company. As a result of those violations, the NRC suspended FTL's license to possess radioactive materials.
>
> In an effort to convince the NRC to reinstate the license, the conspirators agreed to lie to the NRC about the corrective actions allegedly taken by FTL to ensure that the violations would not reoccur. Defendant FINLAY would tell the NRC that he had suspended Timothy Carroll for a month without pay as punishment for his misconduct in order to persuade the NRC that FTL took such violations seriously and to persuade the NRC that its license should not be suspended, when in truth and fact Timothy Carroll would continue to work at FTL and be paid for his services. (CR 48:13-14, ER 13-14).

The ten overt acts of this conspiracy commenced with the 11 September 1987 letter of Finlay that Carroll had been terminated, included representations concerning Carroll's employment status, the receipt and deposit of non-payroll checks by Carroll, and concluded with Finlay's representation on 5 November 1987 to the NRC that Carroll was still not employed by FTL. (CR 48:15-16, ER 15-16).

Counts 15 through 21 charged Finlay and FTL with seven separate violations of 18 U.S.C. 1001 arising out of the "making and use" of a single document or writing seeking recision of FTL's license suspension submitted to the NRC on 5 October 1987. (Govt Ex. 17, Supp ER 21-49).

Edmunds pretrial and at arraignment and Horie at trial and sentencing appeared as counsel for both Finlay and FTL without a waiver of the conflict of interest or inquiry by the court. On appeal, appellate counsel Cleary filed a motion for substitution of counsel and obtained a waiver from each defendant after their consultation with separate counsel which was filed with this court.[2] Because settlement discussions on appeal were initiated, separate counsel for FTC, Lorenz, was retained who also

[2] The motion for substitution and withdrawal of counsel on appeal was apparently filed without formal judicial action of the court of appeals because it was treated as a notice of appearance of counsel on appeal. See order of Appellate Commissioner Shaw, dated 2 September 1994, which treats the motion for substitution as "notice of appearance of counsel." Finlay's agreement and waiver was executed personally by Finlay, and FTL's agreement and waiver by him and corporate counsel pursuant to a board resolution. The agreements were executed after consultation with counsel other than trial or proposed appellate counsel.

filed a substitution of counsel. (Reply Brief 1).

The jurisdiction of the district court over a federal criminal case is 18 U.S.C. 3231.

ARGUMENT

1. A soon-to-be charged defendant is entitled to conflict-free assistance of counsel during precharge negotiations with the prosecutor as to a disposition of this criminal case under the Sixth Amendment right to counsel and Rule 44(c).

In white collar criminal cases, the defense and prosecution often negotiate the case so that case resolution has often been achieved before charges are filed. Pretrial negotiations, when a criminal prosecution is imminent, is a critical stage of a criminal case in which the participation of conflict-free counsel is required. Both the Sixth Amendment and Rule 44(c) applied, especially when defense counsel Edmunds appeared in the case and when an inquiry as to the joint representation was expressly required by Rule 44(c). The opinion of the court of appeals held that the right to conflict-free counsel does not exist prior to the filing of the criminal charge although negotiations (a Sixth Amendment "prosecution") have been undertaken.

In **Wood v. Georgia**, 450 U.S. 261, 272 (1981), this court on its own addressed a conflict of interest of counsel question raised by the facts of the record in a state case and established the necessity under the Sixth Amendment for a hearing: "Nevertheless, the record does demonstrate that the possibility of a conflict of interest was sufficiently

apparent at the time of the revocation hearing to impose upon the court a duty to inquire further."

Rule 44(c), adopted in 1980, creates more, not less protection, than required by the Sixth Amendment. It imposes a mandatory duty on federal courts to make prompt inquiry in cases of joint representation to avoid not only actual but even potential conflicts.[3] The clear policy of avoiding conflicts of Rule 44(c) governs precharge negotiations of both defense and the prosecution of targeted defendants. Both counsel are constitutionally and ethically bound to insure compliance with this rule and the Sixth Amendment. In negotiations prior to charge defense for more than one client has a duty to obtain a valid waiver, and the prosecutor should be required to refrain from such negotiations absent proof of a valid waiver of the conflict. Defense counsel and the prosecutor should have complied with the Sixth Amendment requirement and Rule 44(c) prior to first court appearance. At that time if counsel have not complied, then the court can either accept a waiver of the conflict, disqualify counsel,[4] or take corrective action to remedy any prejudicial error caused by a non-waived conflict. The opinion of the lower court

[3] The lower court equated the Sixth Amendment requirement with Rule 44(c). Pet A. 5712-5713. **Cuyler v. Sullivan**, 446 U.S. 335 (1980) (determination of a Sixth Amendment violation in post-conviction review of a state criminal conviction suggesting court inquiry) and Rule 44(c), mandating prompt court inquiry when there is joint representation, are entirely different.

[4] **Wheat v. United States**, 486 U.S. 153 (1988) (even with consent of the parties to waive the conflict of defense counsel, the court still has broad discretion to disqualify counsel for actual or potential conflicts).

creates a "no man's land" at the critical negotiation stage[5] where conflicts may prevail with impunity because no charge has yet been filed, but which may have most adversely affected the defendant during this critical stage of the "criminal prosecution."[6]

In **Ruffin v. Kemp**, 767 F.2d 748 (11th Cir. 1985) defense counsel represented two defendants and tried to work out a deal so one would testify against the other, but the deal did not materialize. That court found the attorney acted "adversely" without a showing of prejudice and violated the Sixth Amendment requirement for effectiveness. 767 F.2d at 751-752. The court noted that the state prosecutor was at fault, because the conflict of interest should have been readily apparent to him and brought to the attention of the district court. 767 F.2d at 751 n. 5. How much more so should a federal prosecutor

[5] Here the conflict continued through trial and sentencing by second counsel, Horie, for which a waiver was not sought nor obtained. In justifying the conduct of trial counsel, the court below compared appellate counsel to trial counsel (App A. 5713). The function of trial and appellate counsel were dissimilar, and the comparison was inaccurate. Unlike trial counsel, appellate counsel sought approval of the court of appeal by filing a substitution of counsel with a waiver of the conflict with this court.

[6] The right to counsel to bargain and settle an expected criminal charge is inherently different from the admissibility of evidence gathered after a charge has been filed. **See Kirby v. Illinois**, 406 U.S. 682, 689 (1972) (plurality opinion) (right to counsel in lineup does not attach until after the filing of a formal charge); **McNeil v. Wisconsin**, 501 U.S. 171, 175 (1991) (Sixth amendment right to counsel regulating admission of statements exists after filing of formal charge). For purposes of the Sixth Amendment "criminal prosecution," the right to conflict-free counsel attaches once the negotiation as to a given criminal charge has commenced.

be alert given the policy and requirements of Fed. R. Crim. P. 44(c).

Rule 44(c) and the Sixth Amendment were violated in this case where a single attorney purportedly was negotiating a settlement for both parties while seeking to avoid personal liability for one. The difference between Finlay, the personal defendant, and FTL, the corporation was obvious. At the time of the negotiations Finlay's wife was the principal shareholder, and her interest in the corporation was not the same as his. Although not subject to confinement, the corporation had an independent right to negotiate as to the charges filed against it as well as any sentence, which could be a sizeable fine. In this case Finlay's fine was $50,000, but FTL's was $380,000 ($20,000 imposed on each of 19 counts). Each was named in some common counts and also in separate counts.

Every multiple defendant has a common interest "in being exonerated" (App A 5713),[7] but it is the different interests of each that need to be protected. In criminal practice it is common in joint negotiations for multiple defendants where a corporation is involved to seek to have the corporation accept the criminal liability in lieu of the personal defendants or to have a sizeable fine imposed that would lessen the sentence of the personal defendants. This divergence of interest meant FTL was

[7] All defendants have the common interest in being exonerated, but that does not permit joint counsel to represent all of them. Often defendants with the closest relationships might have the greatest conflicts: husband and wife, parent and child, brother and sister. **See United States v. Stites**, 56 F.3d 1020 (9th Cir. 1995). Each has a right to zealous advocacy for their particular interests.

adversely affected because of the attempted shift of exposure and liability to it and away from Finlay. Finlay also had the right to counsel without a conflict -- a loyalty free of any obligation to the corporation.[8]

Edmunds was the attorney who not only conducted negotiations but also made his appearance on behalf of Finlay and FTL at the arraignment and entered not guilty pleas. Rule 44(c) was applicable and violated. Rule 44(c) was designed to force the court to make a prompt inquiry, and, if discovering a conflict, to secure an appropriate waiver or require separate counsel. See **Wheat v. United States**, 486 U.S. 153 (1988) (prosecutorial recommended disqualification of defense counsel in sequential representation with waiver); **United States v. Stites**, 56 F.3d 1020 (9th Cir. 1995) (same attorney representing sister in criminal case having previously represented brother in criminal investigation had an actual conflict of interest, and under Rule 44(c) the sister was not capable of later waiving conflict to permit later representation of the brother).

At trial, defense counsel Horie, representing both Finlay and FTL, sought to save Finlay from liability under the two conspiracies by tacitly admitting FTL's responsibility for the shipments. In closing argument

[8] Although Finlay was the "apparent beneficiary" of the conflict in which FTL was sacrificed, Finlay also suffered because of the lack of undivided loyalty. Separate counsel would be better able to evaluate the case and candidly assess Finlay's individual exposure without unreasonable expectations of transferring liability to the corporation. "The sixth amendment guarantees every criminal defendant the right to the assistance of counsel unhindered by conflicting interests." **United States v. Crespo de Llano**, 830 F.2d 1532, 1538 (9th Cir. 1987).

defense counsel stated the case was not about illegal shipments of radioactivity, the charges against the corporation. (Counts 3-14). The illegal shipments of cameras were not in dispute. (7 RT 36-37). He argued:

> The Government is charging Gordon Finlay with conspiracy. Remember, this is one of the most important things to remember when you get into the jury room: Gordon Finlay is not charged with any illegal shipment, okay? What he is charged with is mainly conspiracy. (7 RT 60).

Finlay, not the corporation, was charged with the two conspiracies (Counts 1 and 2) but not the illegal shipments (Counts 3-14). Defense counsel conceded the substantive counts against the corporation in order to protect Finlay on the conspiracy counts.[9]

The court below did not mention the following language of **Holloway**[10] about the evil of joint representation in plea negotiations and sentencing:

> But in a case of joint representation of conflicting interests the evil --it bears

[9] Defense counsel also argued: "That you try to keep focused on what the actual charges are; do not be distracted by allegations that all that's involved here is you have to find Gordon Finlay knew, authorized and directed other individuals to illegally carry radiographic material on planes. That's not the charge. This is the charge [conspiracy] against Gordon Finlay." (7 RT 92).

[10] **Holloway v. Arkansas** 435 U.S. 475 (1978), prompted the adoption of Rule 44(c). See Advisory Note to the 1979 Amendment.

> repeating -- is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a...conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation. 435 U.S. at 490-491.(Emphasis added).

While Rule 44(c) treats joint representation as the exception and with suspicion, the appellate court's decision redefines "actual conflict" by refusing to recognize the personal defendant and the corporate defendant as separate and by requiring a showing of substantial prejudice. The court found identical the interest of the individual defendant with that of a jointly owned corporation, yet the record shows that the personal defendant sought an advantage while being represented by the same attorney who represented the corporation. The interests of Finlay and FTL, jointly owned by the wife, were factually and legally separate. With separate counsel, or at least a waiver of the conflict, such negotiations might have been pursued. Joint counsel so infected with a demonstrable conflict adversely affected both clients under both the Sixth Amendment and Rule

44(c).

2. The first completely different conspiracy to transport nuclear material and falsify the records of transportation, a pre-Guidelines charge, was erroneously used as Relevant Conduct (§ 1B1.3) for the distinct second conspiracy regarding the employment status of Carroll, a Guidelines charge, and was not justified by the prosecution's incorporation by reference of the language of the first conspiracy.

Count Two realleged all of the paragraphs of Count One (App A 5715), but that did not make it a part of the specific limited and tailored conspiracy in Count Two. The court must look at the actual conspiracy charged rather than allowing the incorporated allegations to finally determine what is relevant conduct.

For the offense of misrepresenting the employment status of Carroll to the NRC (Count 2), the district court declined to follow the Sentencing Guideline § 2F1.1 for fraud. Instead, by adopting the illegal transportation of hazardous substances and related false statements of Count One as relevant conduct, it treated Count Two as Mishandling of Hazardous Substances, § 2Q1.2(b)(4). (Finlay PSR 18). If Count Two was calculated under § 2F1.1, the base offense would have been a Level 6 (0-6 months),[11] but under § 2Q1.2, the base offense with a four-level enhancement was doubled, a Level 12.

[11] If the court were to aggravate by a finding of more than minimal planning, the addition of two points under § 2F1.1(b)(2) to a Level 8 would still remain 0-6 months confinement with the opportunity for probation.

Although in this employment misrepresentation conspiracy Finlay was involved with Carroll, the court included Finlay's role in the transportation conspiracy and for his leadership of five or more participants (§ 3B1.1) imposed a four level increase, for a total of a Level 16 (21-27 months). The sentence was tripled by the inclusion of the acts and Finlay's role in Count 1,[12] which were not within the Guidelines.

The lower court disregarded the Ninth Circuit's leading case on relevant conduct (Guidelines § 1B1.3(a)(2)), **United States v. Hahn**, 960 F.2d 903 (9th Cir. 1992). That court noted that the relevant conduct approach was an exception to the charge-offense approach where a separate conviction existed. **Hahn** admonished against puffing offenses under the talisman of relevant conduct:

> [The] Guidelines § 1B1.3 constitutes a "dubious invitation" for prosecutors " 'to indict for less serious offenses which are easy to prove and then expand them in the probation office.'" 960 F.2d at 909.

In determining the "part of the same course of conduct or part of a common scheme or plan as the count of conviction" that court announced the format for analysis:

> In assessing whether conduct is "relevant"

[12] If Finlay was treated as an organizer in the employment misrepresentation conspiracy, he would have received a two-level increase, which would have given him a Level 10 (6-12 months). The median of 8 months of Level 10 is one-third of the median of Level 16.

> within the meaning of Guidelines § 1B1.3(a)(2), "the sentencing court is to consider such factors as the nature of the defendant's acts, his role, and the number and frequency of repetitions of those acts, in determining whether they indicate a behavior pattern." Id at 372. There must be "'sufficient similarity and temporal proximity to reasonably suggest that repeated instances of criminal behavior constitute a pattern of criminal conduct.'" Id. (quoting William W. Wilkins, Jr. & John R. Steer, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C. L. Rev. 495, 515-16 (1990)). Thus, the essential components of the section 1B1.3(a)(2) analysis are similarity, regularity, and temporal proximity. 960 F.2d at 910

These two conspiracies lack "similarity, regularity, and temporal proximity." No similarity exists between the large scale, multiple air transportations and the fraudulent creation of records in the Count One conspiracy and the misrepresentation of a one-month layoff of Carroll by Finlay of Count Two.

Count One involved many employees on a series of transports and the making of false records to cover those transports, but Count Two involved only Finlay and Carroll. The conspiracy of Count One is a global charge arising out of a series of improper transports and a pattern of cover-up, while Count Two defines a unique transaction concerning a specific misrepresentation to the NRC about

Carroll's employment status.

The most critical factor, which certainly influenced the Government drafting of the charge, is the time period. One offense is not under the Guidelines, the other is. The first conspiracy extended from January through October 1987, but the second narrow conspiracy lasted less than two months (Sep. - Nov. 1987). The nature of the conspiracies are totally dissimilar. To find Count One to be relevant conduct for Count Two is an unfair distortion of the nature of that conspiracy. The Government should not be allowed, through the simple expedient of incorporating other counts by reference, to defeat the true purpose of Relevant Conduct. The transparent attempt to obtain a Guidelines sentence on Count One through a grave distortion of the actual conspiracy is a denial of the elemental due process requirement that the punishment fit the crime.

3. It was error to impose separate sentences for seven false statements under 18 U.S.C. 1001 (Counts 15-21) arising out of the sending of a single document to the NRC on 5 October 1987 when the charge was making and using "a false writing or document" containing a false statement.

The much used Section 1001 by its express language provides three different circumstances for making a false statement:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States [1] knowingly and willfully falsifies, conceals or covers up by any trick,

> scheme, or device a material fact, or [2] makes any false, fictitious or fraudulent statements or representations, or [3] makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. (Emphasis added.)

Counts 15 through 21 each charged Finlay and FTL with separate violations of the third provision of Section 1001 arising out of a single document submitted to the NRC on 5 October 1987 in that they:

> knowingly and willfully did make and use a false writing and document containing a materially false, fictitious and fraudulent statement and entry within the jurisdiction of the U. S. Nuclear Regulatory Commission ("NRC").... (CR 40:24-30, ER 24-30). (Emphasis added.)

The court instructed that these counts charged the defendants "with knowingly and willfully using a document containing a false statement in a matter within the jurisdiction of the United States Nuclear Regulatory Commission (NRC). . . . (7 RT 130, ER 57). (Emphasis added). The indictment charged and the court instructed that the offense of Section 1001 here was the making and using a document containing a false statement. Each offense stated the same offense but referred to different pages within the single document.

The particular statutory language of Section 1001 referring to the document containing false statements was decisive and should have been given effect . In **Bell v. United States**, 349 U.S. 81 (1955), a defendant was convicted of two counts of illegal transportation of two women (18 U.S.C. 2421) on the same trip in the same vehicle, but this court found only one offense for the single transaction. In **Ladner v. United States**, 358 U.S. 169, 177 (1958) a single blast from a shotgun that wounded more than one federal agent was but one assault. Here, the language used in the indictment refers to the overall document and cannot be repeated for increasing the sentence when it is but one offense.

The Ninth Circuit in **United States v. Kennedy**, 726 F.2d 546, 548 (9th Cir. 1984), in order to avoid a conflict with other circuits distinguished its result but admitted the validity of the rule of other circuits: "We distinguish those cases where [other circuit] courts have refused to impose multiple punishment for several 'statements' contained within a single document." The Ninth Circuit panel then noted the decisions from two other circuits (**United States v. Sue**, 586 F.2d 70 (8th Cir. 1978) and **United States v. Sahley**, 526 F.2d 913, 918 (5th Cir. 1976)[13]) that several false statements in a single document constituted but one offense under 18 U.S.C. 1014. If there was but one document as the basis of Counts 15-21, there is but one

[13] The **Sahley** court relied upon **Bell v. United States**, 349 U.S. 81 (1955), **supra**.

offense.[14] This Ninth Circuit decision in this case now conflicts with the other circuits should be resolved to achieve uniformity in sentencing and to avoid the multiplication of sentences of a common federal offense.

The single document, the petition for remission from suspension, encompassing the individual false statements contained within it justified but one sentence.

CONCLUSION

To avoid Sixth Amendment and Rule 44(c) conflicts of counsel during negotiations but prior to the filing of charges, this Court should grant review, reverse both convictions, and order a new trial, or in the alternative order a hearing on the conflict of interest. Because of the need to clarify the use of Relevant Conduct and to avoid unfair multiplication of Section 1001 offenses, this court should grant review, vacate the sentences, and remand for resentencing.

Respectfully submitted,

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DATED: August 1995

[14] This common law principle of lenity is of ancient vintage. **Crepps v. Durden**, 2 Cowp 640, 98 Eng Rep 1283 (KB 1777) (sale of four loaves of bread on Sunday constituted but one offense) cited by Chief Justice Rehnquist in dissent in **Whalen v. United States**, 445 U.S. 684, 704 (1980).

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. GORDON FINLAY, *Defendant-Appellant.*	No. 94-10106 D.C. No. CR-92-01350-01-ACK
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. FINLAY TESTING LABORATORIES, INC., *Defendant-Appellant.*	No. 94-10107 D.C. No. CR-92-01350-02-ACK OPINION

Appeals from the United States District Court
for the District of Hawaii
Alan C. Kay, District Judge, Presiding

Argued and Submitted
March 14, 1995—San Francisco, California

Filed May 25, 1995

Before: Betty B. Fletcher, Stephen Reinhardt
and John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Noonan

APPENDIX A

embraced both the illegal shipments and the illegal absence of documentation and false documentation. It was an essential part of that conspiracy to continue to mislead the NRC and, for that purpose, the false documentation was submitted. As the main conspiracy continued through the commission of the overt act, prosecution was not barred by the statute of limitations.

COUNSEL

John J. Cleary, Cleary & Sevilla, San Diego, California, for defendant-appellant Gordon Finlay.

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Steven S. Alm and Mark E. Recktenwald, Assistant United States Attorneys, for plaintiff-appellee United States.

OPINION

NOONAN, Circuit Judge:

Gordon Finlay (Finlay) appeals his conviction of two conspiracies to defraud the United States in violation of 18 U.S.C. § 371, the first occurring between January and October of 1987 by transporting nuclear materials in violation of law and in this connection falsifying records for submission to the Nuclear Regulatory Commission (the NRC); the second, a conspiracy between August 1987 and November 1987 to defraud the United States by obtaining from the NRC a reinstatement of the license of Finlay Testing Laboratories, Inc. (FTL) to possess radioactive materials. Finlay also challenges his conviction of violating 18 U.S.C. § 1001 by making a materially false statement to the NRC.

Finlay Testing Laboratories, Inc., appeals its conviction of ten counts of illegally transporting radioactive materials in April 1987 in violation of 49 U.S.C. § 1809(b) and its further conviction of six counts of concealing a material fact within the jurisdiction of the NRC in violation of 18 U.S.C. § 1001.

We affirm the convictions of Finlay and of FTL.

FACTS

From the perspective of the government, the following was established at trial:

FTL is engaged in industrial testing by radiography, a process conducted by using portable devices known as "sources" or "cameras" which create an image of a metal object through the use of radiation. Each source contains a small pellet of nuclear material emitting gamma radiation. FTL was licensed to use such radioactive materials by the NRC and was subject to NRC regulations set out in 10 C.F.R. pt. 34 (1994); *see also* 10 C.F.R. pts.19, 20, and 71 (1994).

Gordon Finlay was the owner and chief executive officer of FTL. In 1987 he owned 51% and his wife owned 49% of its stock. In December 1991, after commencement of the NRC investigation leading to the convictions challenged here, he transferred 2% of his stock to his wife, so that she now holds a majority interest, and he put the remaining 49% of the stock into a revocable trust of which he is both the trustee and the beneficiary.

Operating out of Oahu, FTL in 1987 had only three sources in Hawaii. The transportation of radioactive materials was prohibited on aircraft carrying passengers. 49 U.S.C. App. § 1809(b); 49 C.F.R. § 173.448(f). Compliance with the law meant that FTL had to ship its sources by barge with the result that they were tied up for a week on jobs on Hawaiian islands other than Oahu and even longer when the sources were used

on a military base being constructed on Johnston Island, 700 miles from Oahu. FTL could not openly defy the law and report the breach to the NRC. FTL needed swift transport of the sources; to obtain it, FTL had to resort to deception.

In January 1987 Finlay directed the return of a source from Johnston Island to Honolulu by an employee secretly carrying the source aboard a military passenger plane. Finlay sent out a replacement source to Johnston Island as unaccompanied baggage on a civilian passenger plane. In the same month Finlay himself covertly carried a source on a passenger flight from Oahu to the Big Island of Hawaii and brought a source back in the same way. In February 1987 FTL's radiation safety officer, Tim Carroll, put a source aboard a passenger flight to the Big Island for a job at Big Island Meat Company. Two other FTL employees, at Finlay's direction, brought the undocumented source back to Oahu. In April 1987 an FTL employee made three interisland trips on passenger aircraft secretly carrying sources at Finlay's direction. Also at Finlay's order they secretly carried a source to Maui and back to Oahu. On August 18, 1987, Finlay packed a container carrying a source for Ron and Randy Austin, who then carried it without documentation on a military passenger flight from Oahu to Johnston Island.

The NRC required licensees such as FTL to maintain "U-logs" to be prepared each time a source was used. FTL was also required to maintain shipping and receiving logs for the sources and to make out Hazmat forms warning shippers that they were carrying hazardous material. FTL did not prepare the U-logs or other documents that were required for any of the above-listed interisland or Johnston Island flights. For the Johnston Island job the records were further falsified to indicate that the sources were sent by barge.

In August 1987 the NRC learned of two of the illegal shipments: that to the Big Island Meat Company and that by the

Austin brothers to Johnston Island. The NRC began an investigation.

Carroll admitted to the NRC that he had been involved with the source shipment to the Big Island Meat Company. Finlay and Carroll agreed that the way to placate the NRC was for Finlay to appear to suspend Carroll, and Finlay announced a one month suspension without pay in a letter to Carroll that Finlay showed to NRC investigators. Carroll continued to work and to be paid, although these facts were kept from the NRC. Despite the show of contrition, the NRC suspended FTL's license on September 21, 1987.

Two weeks later, on October 5, 1987, FTL filed a "request for recision or relaxation of order" with the NRC. The two incidents that the NRC knew of were presented by FTL as actions by employees acting without Finlay's knowledge. The violations were said not to have been authorized by FTL or Finlay "and certainly were not the usual course of business at Finlay Testing." Finlay was stated to have provided all the appropriate shipping papers, including a Hazmat form to Ron Austin for the August shipment to Johnston Island. Carroll's action was portrayed as "surprising, aberrational and unusual," and to have been met, when discovered, by Carroll's prompt suspension, at the end of which chastisement he would return, reformed, to the company. Attached to this request to the NRC were six false documents that Carroll had faked in April 1987 at Finlay's direction to cover up the illegal January 1987 shipments to and from Johnston Island. These documents were submitted as evidence that the proper papers had been prepared for the later Austin shipment. The bluff was clumsy since the documents on their face were dated January 9, 1987: apparently Finlay thought the fact that Carroll's name appeared on them would be enough for them to pass muster with the NRC.

PROCEEDINGS

By April 1992 the United States Attorney for the District of Hawaii was on the verge of procuring an indictment of

FTL and Finlay. Finlay already had one lawyer, Dennis Ing, for business matters. He now sought the assistance of an experienced criminal defense lawyer, John Edmunds, who contacted the United States Attorney, Daniel Bent. Bent made it clear that the United States was willing to negotiate but only if the defendants waived the five year statute of limitations. In response to this position, FTL passed a corporate resolution, drafted by Ing, authorizing the waiver of the statute of limitations for any failure of the United States to prosecute prior to April 3, 1992. Finlay signed this waiver on behalf of FTL.

Thereafter Edmunds and the United States Attorney's Office continued their conversations. In the course of them Bent stated that the United States was ready to indict FTL and Finlay at any time. The government had already indicted Carroll, and that indictment was shown to Edmunds and to Finlay. In the face of Bent's representations, Edmunds advised Finlay that negotiations could not go on unless Finlay authorized him to waive the statute for both Finlay and FTL. Finlay so authorized Edmunds. During July and August "everyone" was going to be out of town, so that it was important that a waiver be executed that would be in effect during this period.

At the beginning of August two such waivers were executed, one on behalf of Finlay and another on behalf of FTL; the waivers provided "that the period between March 30, 1992 through September 14, 1992 shall not be considered in computing the time that has run under any statute of limitations that may apply to a criminal prosecution against" either defendant. The waivers were signed by Edmunds and not by Finlay or any other officer of FTL.

Later, on August 14, 1992, Edmunds told Finlay that he had executed the waivers. Finlay made no negative comment and did not tell Edmunds that he had acted without authorization and should so advise the United States Attorney. On September 15, however, after a meeting with the United States

Attorney, Finlay informed him that Edmunds had no authority to sign. The next day Finlay and FTL were indicted.

At trial Finlay moved for acquittal on the first count of conspiracy on the ground that the statute of limitations had run on all acts prior to October 1987; that Edmunds had acted without authorization in waiving the statute; and that the October 5, 1987, act charged in Count I was simply a concealment of the main conspiracy, not indictable under *Grunewald v. United States*, 353 U.S. 391, 403-404 (1967). The district court denied the motion after an evidentiary hearing on Edmunds' authority to sign. The district court found that Edmunds had authority. The district court further found that, in any event, the United States Attorney had justly relied on Edmunds' representation that he had authority and that Finlay was estopped from repudiating the waiver. The district court also concluded that the acts charged as occurring on October 5, 1987, were part of the main conspiracy and so not barred by *Grunewald*. The jury found Finlay and FTL guilty as already indicated.

The defendants appeal. On this appeal, they raise for the first time the identity of counsel representing Finlay and FTL. They note that Edmunds represented both defendants in preliminary negotiations and at the arraignment. At the trial both defendants were represented by Walter Horie. On this appeal they were represented by John J. Cleary, who, in his opening brief, indicated that separate counsel might appear for them. In fact, a reply brief was filed on behalf of FTL by separate counsel, M. James Lorenz; his brief adopted by reference Cleary's reply brief. Both Lorenz and Cleary argued the case orally before this court.

[1] The defendants point to Fed. R. Crim. P. 44(c) which requires the district court, in the case of joint defendants represented by a single counsel, to hold a hearing and to take appropriate measures to assure that each defendant has proper representation "unless there is good cause to believe that no

conflict of interest will arise." It is argued on this appeal that this hearing was not held, no inquiry was made as to the propriety of the representation, and the single counsel acting for both defendants was, in effect, a deprivation of the right to counsel, requiring reversal.

FTL further contends that its waiver of the statute of limitations was invalid because of the conflict of interest of Edmunds. Finlay and FTL contend that the August waivers were invalid because they did not authorize those waivers and because of Edmunds' conflict of interest.

Finlay contends that the October 1987 actions were not properly charged in the Count I conspiracy, but belong to the Count II conspiracy to obtain the renewal of FTL's license. Finlay also contends that the statement charged as false in Count XV that Carroll had been suspended for a month was not false because Finlay merely stated he "intended" to suspend Carroll. Finlay also objects to the court considering as relevant conduct for sentencing under Count II the actions charged under Count I and argues that his sentence was improperly enhanced by this inclusion. The defendants also contend that the government improperly charged them with seven separate violations of 18 U.S.C. § 1001 arising out of a single document submitted to NRC on October 5, 1987. FTL contends that failure to disclose the probation officer's recommendation as to the calculation of the fine denied FTL due process and equal protection of the law. Finally, Finlay challenges the imposition of supervised release on him in connection with his conviction of pre-guideline counts.

ANALYSIS

One Lawyer for Two Criminal Defendants

The Sixth Amendment imposes no affirmative duty on a trial court "to inquire into the propriety of multiple representations." *Cuyler v. Sullivan*, 446 U.S. 335, 348

(1980). To establish a Sixth Amendment violation, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id.* However, what is meant by "adversely affected" is glossed by the direction that a defendant "need not demonstrate prejudice in order to obtain relief." *Id.* at 349-350. His burden is less than showing actual harm; he must show actual conflict.

[2] The defendants fail to make this showing of actual conflict of interest at trial. Each had the same interest in being exonerated. Each was defended by Horie in a way designed to achieve that end. FTL was not sacrificed for Finlay; he was not sacrificed for the company. So far as being dissatisfied with the representation by a single counsel for the two defendants, even on this appeal, no separate counsel came in until the reply brief; and separate counsel only repeated for FTL what Cleary had already said for Finlay. It would be an exercise in pedantry to hold under these circumstances that there was an actual conflict of interest necessitating two lawyers where one was enough to do a professional job.

[3] Fed. R. Crim. P. 44(c) was not observed. We have previously held that a district court's failure to comply with Rule 44(c), without more, does not compel reversal. *United States v. Crespo de Llano*, 838 F.2d 1006, 1013 (9th Cir. 1987). Because the defendants have failed to demonstrate an actual conflict, we decline to reverse on this ground. *Id.* We doubt, although we do not decide, that the district court could have properly forced Finlay and FTL to adopt separate counsel. The representation of the two defendants by Edmunds when he waived the statute of limitations does not involve the Sixth Amendment: the representation was not in court, and no court had supervision of what Finlay for himself and as CEO of FTL decided. No objection can be taken to his decision to use a single lawyer for the purposes of exploring the government's position.

AFFIRMED.

The Count I Conspiracy

[4] The final overt act of the Count I conspiracy, as charged in the indictment, was the submission of the request to the NRC to end the suspension. The request was filed on October 5, 1987, and so prosecution of any false statements it contained was not barred by the statute of limitations. It is argued here, as it was argued in the district court, that *Grunewald*, 353 U.S. at 403-404, bars treating the concealment of a conspiracy as part of the conspiracy. The reason for the *Grunewald* rule is that otherwise the statute of limitations on conspiracies could be virtually eliminated by always charging a cover-up as part of the conspiracy. *Id.* at 405. "But a vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objects of the conspiracy, and acts of concealment done after the central objectives have been obtained, for the purpose only of covering up after the crime." *Id.* (emphasis in original).

[5] The main conspiracy charged in Count I of the indictment in our case was a conspiracy to defraud the United States. The submission of the false documents prepared for the Johnston Island shipments was part of the main conspiracy to defraud the United States by concealing from the NRC the violation of its rules governing shipments. The conspiracy, as charged, embraced both the illegal shipments and the illegal absence of documentation and false documentation. It was an essential part of this conspiracy to continue to mislead the NRC and for that purpose on October 5 the false documentation was submitted. As the main conspiracy continued through the commission of this overt act, prosecution was not barred by the statute of limitations. That the false documents also played a part in the second conspiracy to get back the license does not mitigate their use to further the goal of the first conspiracy.

The Extension of the Statute of Limitations

It is unnecessary, therefore, for us to determine whether the statute of limitations was extended by the waivers signed only

by Edmunds. Our resolution of the question of the conspiracy charged in Count I renders that issue moot.

The Falsity of the Statement Regarding Carroll

Although the letter submitted by Finlay to the NRC announced an intention, as of September 11, 1987, to suspend Carroll, at the point Finlay submitted the letter to the NRC on October 5, 1987, Finlay's submission to the NRC informed that agency that the suspension had occurred. The statement was materially false. Thus, we decline Finlay's invitation to reverse his Count XV conviction.

The Sentencing Issues

Count II related to acts that occurred after the Sentencing Guidelines had come into effect. It recharges all of the actions listed in Count I. Consequently, when Finlay was convicted under Count II, he was convicted of a crime as to which the acts listed in Count I constituted relevant conduct for Guidelines purposes. The district court did not err in taking this conduct into account.

The charge of seven separate false statements submitted to the NRC was permissible on the basis of the precedent set by *United States v. Uco Oil Co.*, 546 F.2d 833, 838-39 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977).

FTL had no right to know the recommendation of the probation officer as to the fine. The recommendation was not a factual part of the presentence report.

The government agrees that supervised release should not be imposed on Finlay for Counts XV through XXI. However, such supervised release is already concurrently imposed on

him under his conviction on Count I. There is no need to remand for resentencing.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	FILED JUL 19 1995
	)	
Plaintiff-Appellee,	)	No. 94-10106
	)	
v.	)	D.C. No. CR-92-01350-01-ACK
	)	
GORDON FINLAY,	)	
	)	
Defendant-Appellant.	)	
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	No. 94-10107
	)	
v.	)	D.C. No. CR-92-01350-02-ACK
	)	
FINLAY TESTING LABORATORIES, INC.,	)	ORDER
	)	
Defendant-Appellant.	)	

Before: FLETCHER, REINHARDT and NOONAN, Circuit Judges

APPENDIX B

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

No.

In the Supreme Court of the United States
October Term 1994
United States of America,Respondent

v.

Gordon Finlay
Finlay Testing Laboratories, Inc.
Petitioners

PROOF OF SERVICE

I, the undersigned, say that I am over 18 years of age, a resident of the State of California and not a party to the within action; that my business address is 1010 Second Ave., Suite 1601, San Diego, CA 92101. I served the Petition for Writ of Certiorari by mailing in United States postal express today three copies to the Solicitor General, one copy to opposing counsel, and one copy to the U. S. Court of Appeals for the Ninth Circuit:

Solicitor General
Washington, DC 20530

Mark Recktenwald
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300 Ala Moana Blvd., Ste. 6100
Honolulu, HI 96813

Clerk
U. S. Court of Appeals
P.O. Box 193939
San Francisco, CA 94119-3939

I certify under penalty of perjury that the foregoing is true and correct. Executed on the ___ day of August 1995 at San Diego, CA

John J. Cleary
Member of the Bar of this Court